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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 512

BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF HERNANDO, STATE OF FLORIDA, a body corporate under the Laws of the State of Florida.

Petitioner

vs.

W. J. MEREDITH, JAMES G. MARTIN, and A. R. OHMART,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE WRIT OF CERTIORARI

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The writ of certiorari should be denied because:

(a) The decision, construing a State statute, followed all binding decisions of the State of Florida.

(b) The decision followed the great weight of authority in the State of Florida.

(c) The statute is not shown to be unconstitutional beyond all reasonable doubt.

(d) The procedure in entering final judgment on affidavits was correct procedure under the Federal Rules of Civil Procedure.

STATEMENT OF CASE

1. Respondents, as innocent holders, instituted suit on coupons from bonds issued by the Board of Public Instruction of Hernando County, Florida, under authority of Chapter 10,655, Laws of Florida, 1925. Prior to delivery the bonds had been validated by judicial decree (R. 9461, 38). The lower court held the act unconstitutional, the bonds void, and entered judgment against the Respondents.

2. The judgment by the lower court was appealed. During the pendency of the appeal, and prior to its determination, the Supreme Court of Florida, by an evenly divided court, affirmed the opinion of the lower court on a similar act in *State ex rel, Vickery vs. Mowat,* 141 Fla. 710, 193 So. 751. The Circuit Court of Appeals, 112 F. (2) 914, determined that it was not bound by the decision of the evenly divided Supreme Court of Florida, followed the great weight of authority, reversed the decision of the lower court, and held the act constitutional and the bonds valid.

3. After the mandate came down, the Defendant, without leave of court, filed new defenses, denying execution of the instruments and denying that the coupons were detached from bonds executed by the Defendant. Request for admission of facts showing the execution and the validity of the coupons

was served upon the Defendant pursuant to Rule 36 of the Federal Rules of Civil Procedure. The Defendant neither admitted nor denied the execution of the instruments, nor the validity of the originals served upon them. Thereupon, Respondents filed ex parte affidavits (R. 9803, 17) and judgment was formally entered against the Defendant accordingly. The procedure in entering the judgment was appealed. It was affirmed (119 F. (2) 712).

ARGUMENT

I.

The State Court decision was not binding upon the Federal Court.

The Petitioner contends that the lower court decision of *State ex rel Vickery vs. Mowat*, 141 Fla. 710, 193 So. 751, affirmed by an evenly divided Supreme Court, although contrary to the great weight of authority in the State, became the binding precedent which all courts in the State of Florida, and the Federal Courts, lower and appellate, are bound.

Such a decision, by an evenly divided appellate court, has no binding effect whatsoever, under the rule of *stare decisis*, on either an appellate court of the State of Florida, on a lower court, or, by the same reasoning, on a Federal District or Appellate Court.

Hampton vs. McClung, 47 Fla. 224, 37 So. 51.

Dale vs. Jennings, 90 Fla. 234, 107 So. 175, 181.

Heitz vs. Woodman, 218 U. S. 205, 54 L. Ed. 1001.

Williams vs. New York, P. & N. R. Co., 11 F. (2) 363.

14 Am. Jur. 294.

The argument of the Petitioner is that the Supreme Court of the State of Florida not being able to render a binding decision on a similar statute, this Court must then look to the lower court's decision holding a similar act unconstitutional, and that such decision is absolutely binding on the Federal Appellate Court. Its contention is that the Federal Court, parrot like, must echo a decision of a lower state court when the state appellate court could not make a binding decision on the same point. The fallacy of the argument is seen in its premise.

No other court in the State of Florida is bound by such a pronouncement of the Supreme Court of Florida or by the lower court. Even the lower court itself is not bound in subsequent actions by other parties on the same subject matter. The fact that the Supreme Court of Florida was divided evenly on the case leaves all courts, state and Federal, free to disregard all phases of that case as a binding precedent in future litigation, or, as stated in *Hampton vs. McClung, supra:*

> "* * the judgment possesses no dignity as a judicial precedent. It carries upon its face a badge which precludes any application of it in future under the doctrine of stare decisis. The judges simply agree that it is expedient to finish the litigation."

It is not amiss at this time to observe that the Honorable A. V. Long, a judge of the Northern District of Florida on September 23, 1940, rendered a final judgment, under case No. 23, against the Board of Public Instruction of Bay County on bonds issued under the very same statute, which the Supreme

Court of the State of Florida was unable to agree upon, and which statute counsel for Petitioner claims is identical with the one which is the subject of these proceedings, which judgment is recorded in new Civil Minute Book 1, at page 159, of the Records of the United States District Court for the Northern District of Florida, Marianna Division.

Counsel for Petitioner places unabiding and, it must be said, hopeful faith in the pronouncements of this Court in the cases of *West vs. American Telephone and Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, 85 L. Ed. 146; and *Fidelity Union Trust Company vs. Field*, 31 U. S. 169, 61 S. Ct. 176, 85 L. Ed. 176; holding that where a court of last resort in a State has not passed upon a question, the Federal Courts are then bound by the decisions of an intermediate state court on the point. In the *West* case, a decision was rendered by a trial court, which was reversed by an *intermediate appellate* court. The State Supreme Court then refused to review the decision of the intermediate appellate court on a suggestion of "probable error". Thus we have, in effect, a decision by a Supreme Court of the State affirming the decision of the intermediate appellate court. Note, however, the significant language used by the Supreme Court of the United States in that case:

> "Where an intermediate *appellate* State Court rests its considered judgment upon the rules of law which it announces, that is a datum for ascertaining State law which is not to be disregarded by a Federal Court unless it is convinced by *other persuasive data that the highest court of the State would decide otherwise.*" (Emphasis supplied.)

Thus, the "persuasive data" was there. The Supreme Court of the State had refused to review the decision of the inter-

mediate appellate court, thereby placing its stamp of approval on that appellate decision and clearly determining that the Supreme Court of the State would have decided the case as the appellate court did.

In the *Fidelity Union Trust Company* case, supra, the Federal Court had refused to follow the lower court decision rendered by the Chancery Court of New Jersey. The Supreme Court of the United States made this significant observation:

> "In the absence of any contrary showing, the rule of the Thatcher and Travers cases *appears to be the one which would be applied in litigation in the State Court* and whether believing it to be sound or unsound it should have been followed by the Circuit Court of Appeals."

We agree with counsel for the Petitioner that the Federal Courts should follow the State Court decisions in a state where the lower court decisions are binding and where it appears that the decision is the one which would be applied in future litigation in the state court, but the decision of the lower court in the Bay County case (*State ex rel. Vickery vs. Mowat, supra*) is not a decision "which would be applied in litigation in the State Court". Moreover, the "persuasive data", as enunciated in the American Telephone and Telegraph case by the highest court of the State of Florida, is not in accord with the decision of the lower court in the Vickery case. The one point that the Supreme Court of the State of Florida definitely decided in the Mowat case was that the lower court decision was not a binding precedent on any other court in the State of Florida; that the decision had no force or effect whatsoever. The perfect answer to the contention made by the Petitioner that the decision of the Circuit Court is a binding precedent which must be followed by the Federal Courts,

notwithstanding the fact that the Supreme Court of Florida was unable to agree on the point, is answered in the old case of *Fraser vs. Willey*, 2 Fla. 116, referring to an evenly divided opinion:

> "It may be said that there is a *sub modo* decision, inasmuch as there is a judgment of the court, but at most it would appear a decision by operation of law, and not by the court, a majority being necessary to produce that result. *Nor can we involve the decision of the judge at nisi prius to be thrown in one scale or the other.* The case comes *de novo*, with the facts already ascertained, the counsel better and more maturely prepared than in the court below, and is to be decided by a tribunal possessing all the advantages of an appellate court."

By the same reasoning and by the many adjudicated decisions in the State of Florida, beginning with *Fraser vs. Willey* and *Hampton vs. McClung*, supra, the decision of the appellate court and the decision of the lower court have no binding force whatsoever, and any court in the State of Florida, as well as the Federal Courts, is free to pursue its own independent judgment in determining the legal liability of the Board on its obligations. This, the Circuit Court of Appeals did.

II.

The decision follows the great weight of authority in the State of Florida.

These facts are apparent:

(a) The bonds were issued pursuant to Chapter 10,655, Laws of Florida, Special Acts 1925.

(b) The bonds, prior to delivery, were validated by a judicial decree.

(c) The bonds were issued for the purpose of constructing a county high school in Hernando County, Florida.

(d) At the time of the execution and delivery of the bonds, and at the time of their validation, the Supreme Court of Florida had held that such bonds, issued for the purpose of enlarging a county high school, were valid and binding obligations of a Board of Public Instruction.

The bonds issued by the various Boards of Public Instruction in the State of Florida have been a source of prolific litigation. The Constitution of Florida provides (See Appendix "A", page 27) that each county shall be required to assess and collect annually for the *support* of the public free schools therein a tax of not less than three (3) and not more than ten (10) mills. Legislation has been enacted to carry out this constitutional provision. Chapter 10,655, Laws of Florida, Special Acts 1925, authorized the bonds to be issued by the Board of Public Instruction of Hernando County, Florida, to construct a countywide high school building, the bonds to be paid from taxes authorized by Section 8 of Article XII of the Constitution of the State of Florida. Thus, the question narrows itself down to a simple proposition of whether or not the construction of a county high school is for the "support" of the public free schools of the county, and whether or not, under the great weight of authority, not only at the time of issuance of the bonds but at all times since then, it has been determined that bonds could be issued to construct countywide high schools. A review of all leading cases in the State of Florida will clearly drive home to this Court that it has been determined:

(1) At the time of the issuance of the bonds herein sued upon that instruments issued for the purpose of raising money to construct buildings by the Board of Public Instruction were valid obligations;

(2) That recovery has never been denied on Board of Public Instruction bonds under similar cricumstances.

In order that this Court may get a true picture of the development of the laws of the State of Florida, the leading cases have been condensed and are herein chronologically listed by dates showing the points involved and the disposition of the cases:

(1898) *State ex rel Bours vs. L'Engle,* 40 Fla. 392, 24 So. 539, was a mandamus proceeding to require the County Commissioners to call an election to determine whether county bonds could be issued as authorized by an act of the Legislature to purchase school sites. The Court held that the Act violated Section 8 of Article XII because the county taxes authorized were not a part of the school levy as required by said section, but definitely implied that had they been made a part of the school levy (generally known as the General County 10-mill levy), the Act would have been valid.

The Constitution was amended in 1912, adding Section 17 of Article XII (Special School Districts).

(1921) *Johnson vs. Board of Public Instruction,* 81 Fla. 503, 88 So. 308, in a validating decree of Special Tax School District bonds, held that Section 17 of Article XII (first added to the Constitution in 1912) was designed to supplement the funds provided by Section 10 of Article XII (having to do with school districts and the district levies for maintenance)

so as to more amply provide the facilities for which bonds are usually issued. The Court held that the Constitution did not contemplate the issuance of bonds payable in the future for defraying general expenses of running and operating such schools. The implication definitely was that bonds could be issued for the purpose of acquiring sites, or building *permanent* facilities—these being the usual cause or purpose for the issuance of bonds.

(1922) *Leonard vs. Franklin,* 84 Fla. 402, 93 So. 688, enjoined the issuance of interest bearing warrants for the purpose of providing funds to acquire, build and equip public high school buildings in *stated special tax school districts* because it violated Sections 10, 11 and 17 of Article XII—the Court holding that Section 17 (added in 1912) showed an intent that buildings in stated special tax school districts for the *use of such districts* should be paid for by district obligations. However, nothing in this case held that county-wide obligations payable out of the general county school fund for the purpose of erecting a building *for the use of the county as a whole* could not be validly issued.

(1923) *Warren vs. Board of Public Instruction,* 86 Fla. 234, 97 So. 384, affirmed a decree of the Circuit Court of Hillsborough County, refusing to enjoin the issuance of Board of Public Instruction time warrants under Chapter 9464, Acts of 1923, for the purpose of *enlarging and furnishing* a high school building in Hillsborough County with payment to be made out of the proceeds of the levy provided by Section 8 of Article XII of the Constitution of Florida.

Thus, it is up to and including 1923, every case before the Court came before the Court prior to the issuance of

bonds—either by validation proceedings or by injunction. The decision in the Warren case was clear, unambiguous, and precisely on point—holding that a Board of Public Instruction could issue bonds to be paid from taxes levied under Section 8 of Article XII of the Constitution of Florida.

It was during the period of time from 1923 to 1928 that the majority of the Board of Public Instruction bonds were issued in Florida, the reason being two-fold: (1) The great Florida "boom" was in progress, and obviously school facilities had to be increased; and (2) two hurricanes hit the State, destroying many school buildings.

1925—The bonds, which are the subject of this action, were issued—for the same purpose the Supreme Court had approved in the Warren case—to build a countywide high school. The bonds were validated by judicial decree prior to delivery in June, 1925.

Compare the title of the act involved in the Warren case (Chapter 9464, Acts 1923) (Appendix B, page 29) with the title in the Hernando case, Chapter 10,655, Special Acts 1925, (Appendix C, page 30). They are, for all intents and purposes, identical.

(1928) *Barrow vs. Moffet*, 95 Fla. 111, 116 So. 71, was a validation proceeding. The Court refused to validate bonds issued by the Board of Public Instruction of Highlands County for the purpose of funding a *floating indebtedness*, the bonds to be re-paid from the future proceeds inuring to the Board under Section 8 of Article XII. The Court held that the Constitution contemplated payment when due of expenses for maintenance and support and did not contemplate an issue

of bonds to pay for a past indebtedness. The Court distinguished the Warren case and said:

> "In the Warren Case, the statute authorized interest-bearing time warrants to raise money for present and future needs in 'the maintenance and support' of free schools in the county, not the payment of outstanding indebtedness."

Thus, the Court again reaffirmed the propriety of bonds for the purpose of acquiring permanent facilities for present and future needs, but refused to validate bonds for the purpose of paying current indebtedness from the proceeds of future taxes.

(1929) The case of *State vs. Board of Public Instruction for Indian River County*, 98 Fla. 1152, 125 So. 357, was a validation proceeding. The bonds were to be issued to pay teachers' salaries and to repair, furnish and equip any public school building, or pay any other operating expense. The Court held the authorizing act violative of Section 9 of Article XII, upon the ground that the Constitution does not permit the county school fund to be used for the payment of bonds issued for county school *current expenses.*

(1930) *Board of Public Instruction of Lafayette County vs. Union School Furnishing Co.*, 100 Fla. 326, 129 So. 824, injected the first bit of confusion in the law on the subject. A suit for reformation and for judgment. Certain notes payable from future funds evidencing an indebtedness were held invalid on authority of the *Leonard v. Franklin*, and *Barrow v. Moffet*, supra.

(1933) *Board of Public Instruction for Lafayette County vs. First National Bank of Gainesville*, 111 Fla. 4, 143 So.

738, re-hearing 149 So. 213. Sections 566 to 568, C. G. L. 1927, were held valid as permitting a Board of Public Instruction to anticipate its requirements and borrow money against its anticipated receipts for the current year. The Court held that such Board must be held to the same degree of integrity and liability as an individual in its action as a corporate body.

(1933) *Board of Public Instruction of Okaloosa County vs. Kennedy*, 109 Fla. 153, 147 So. 250, permitted recovery on a certificate of indebtedness issued to evidence money due for services rendered in transporting pupils. The Court held that although the Constitution contemplates the payment of school indebtedness when and as due, it did not necessarily mean that an indebtedness once lawfully incurred for the support and maintenance of public free schools might not be made lawfully payable at a later date out of the proceeds derived from the authorized tax levy under Section 8 of Article XII. The Court did away with the illogical distinction between funding a past due indebtedness and issuing bonds for current operating expenses.

Thus, the Court reiterated its former holding in the Warren case and held that there is no difference between the power to issue bonds (1) to pay current expenses when the revenues fall short, or (2) to issue bonds to fund a floating indebtedness accumulated in the past, or (3) to defray the cost of "permanent school facilities, lands, buildings, or equipment", the cost of which is chargeable against the funds of each scholastic year for which the same are used. This case is not distinguishable upon the basis that the Court was discussing funds arising under Sections 10 or 17, and not funds arising under Section 8 of Article XII. The Court was con-

cerned with and decided solely the liability of a Board of Public Instruction, as such, on obligations payable out of the county school fund, and not the special district funds.

(1934) *State Bank of Bowling Green vs. Board of Public Instruction of Hardee County*, 116 Fla. 184, 156 So. 319, held the Board liable upon warrants issued by it to represent its share of the outstanding school indebtedness of DeSoto County out of which Hardee County was created in 1921. Note this significant language:

> "An indebtedness once lawfully incurred for the support and maintenance of the public free schools, as authorized by law, and within the limitations of the Constitution, if not paid when due, continues as a charge payable at a later date out of the revenues derived from the authorized tax levy required to be made for school purposes. State ex rel. Gibson and Board of Public Instruction of Monroe County v. Bervaldi, 103 Fla. 902, 138 So. 380; State ex rel. Board of Public Instruction of Gadsden County v. County Com'rs. 17 Fla. 418."

(1935) *Logan vs. Board of Public Instruction for Polk County*, 18 Fla. 184, 158 So. 720, involved the funds of a *special tax school district.* The Court held that the law contemplated that money lawfully and in good faith borrowed and used by proper officers for authorized school purposes should be repaid, even though current expenditures must be curtailed. The Court further held there was implied authority to borrow funds for a special tax school district with no express prohibition against the same in the Constitution.

(1934) *City Bank of New York vs. Board of Public Instruction of Manatee County, McCloskey vs. Board of Public*

Instruction of Manatee County, and *Westgate, Inc., vs. Board of Public Instruction of Manatee County*, 11 Fed. Supp. 570, was an action to reduce to judgment certain refunding bonds issued in 1919 to refund a floating indebtedness. The Court held valid an act providing for the issuance of bonds to fund such floating indebtedness. The prior cases were cited, and the Barrow, Indian River and Union School Furnishing Co. cases, supra, were held *inapplicable to bonds issued prior to the decision in them.* It applied correctly the rule first announced by the Supreme Court of the United States in *Gelpcke vs. Dubuque*, 1 Wall 175, 17 L. Ed. 520, to the effect that the decisions in effect at the time of the issuance of the bonds would be followed.

The Supreme Court of the United States in the Dubuque case correctly refused to follow the later contrary decision, and held that rights which had become vested under the original decision could not be divested by a mere "oscillation" in the decisions of the Supreme Court of the State. See *Bacon vs. Texas*, 163 U. S. 207, 41 L. Ed. 132.

When Federal jurisdiction is supported upon the ground of diversity of citizenship and a suit is brought originally in a Federal Court, the Supreme Court of the United States, in the exercise of its coordinate jurisdiction to construe the State law, will follow the earlier, rather than the later decisions of the State Courts. See *Central Land Co. vs. Laidley*, 159 U. S. 103, 40 L. Ed. 91. Thus, the decision in *Erie Railroad Co. vs. Tompkins*, 82 L. Ed. 787, has no bearing.

(1936) *Fidelity Life Association vs. Board of Public Instruction for Martin County* and *Board of Public Instruction for Polk County vs. Gillespie*, 81 F. (2) 586, (C. C. A. 5) was

an action to reduce bonds to judgment. The Court upheld the validity of acts authorizing the issuance of interest bearing bonds to fund a past due indebtedness, and could find no implied limitation against the Legislature's power to grant such authority.

(1936) *State vs. Board of Public Instruction for Dade County*, 126 Fla. 142, 170 So. 602, in a validation proceeding followed the decisions of the Federal Courts and permitted validation of refunding bonds to be issued to refund two types of indebtedness of the Board of Public Instruction of Dade County:

(a) For funding an outstanding indebtedness incurred in operating the public schools of the county, and

(b) For *repairing* and furnishing public school buildings in Dade County damaged or *destroyed* by the hurricane in 1926.

In this opinion the Court cites with authority the Warren case, supra, involving the Hillsborough County high school, and specifically states that both as to county school funds and special tax school district funds, the Legislature may use school funds to build buildings:

> "If not pledged for other purposes, the Board of Public Instruction has implied authority to use these funds for *buildings, repairs, permanent equipment*, and other school purposes."

(1938) *Hamrick vs. Special Tax School District No. 1 of Jefferson County*, 130 Fla. 453, 178 So. 406, made the very significant distinction between the facilities acquired by

a special tax school district and open solely to those residing within that district, and county-wide facilities usable by the county as a whole. It pointed out that school facilities exclusively for a *particular* district are to be paid by taxation of the property in the district and that such entities are separate and distinct from countywide functions.

(1939) *Board of Public Instruction for Brevard County, Florida, vs. Osborn,* (C. C. A. 5) 101 F. (2) 919. The Court had before it and held valid bonds authorized to fund a *floating indebtedness* theretofore incurred for the support of the public schools. Any question as to a valid pledge of the county-wide levy, provided for by Section 8 of Article XII to pay principal or interest on bonds issued to acquire or build a county-wide high school was not involved. However, the dicta referring to the school fund can be no stronger than the cases on which it is based, which were all except the Warren case, decided subsequent to the issuance of the bonds. Dicta on this score was specifically limited to the citation of cases which had either refused issuance or validation of such bonds —and in fact the cases cited were not cases involving the question in the suit at bar, and the Court was prompt to call attention to the situation that exists where bonds or time warrants have been validated and sold and do not embarrass the operation of the schools.

Thus, all of the leading cases on the subject to the year 1939 have consistently held that bonds issued by a Board of Public Instruction, validated, and placed on the market to pay for (a) enlarging, or (b) repairing school buildings were valid obligations and that innocent bona fide holders thereof could recover thereon. Then came the unusual case of *State ex rel. Vickery vs. Mowat,* supra, the lone star in the heaven

of decisions to the contrary which the Petitioner points to this Court as the one which it must blindly follow.

The case was an action to require a levy of taxes to pay bonds issued by the Board of Public Instruction of Bay County, Florida, which bonds were authorized under Chapter 10,366, Special Acts, Laws of Florida, 1925. This Chapter is identical with Chapter 10,655, Laws of Florida, Special Acts 1925. Note the titles of the two acts, Appendix C, page 30 and Appendix D, page 31. On a writ of error to the Supreme Court of Florida, from a lower court decision holding the act void, Judge Terrell of that court wrote an opinion holding the chapter authorizing the Bay County Board of Public Instruction bonds valid (See Appendix E, page 32). Note this significant language used by him:

Judge Terrell, of the Supreme Court of the State of Florida, wrote an opinion holding the chapter authorizing the Bay County Board of Public Instruction bonds valid (See Appendix E, page . .). Note this significant language used by Judge Terrell:

> "A board of public instruction should not be permitted under the guise of a constitutional guaranty to provide a facility like a high school building for the county and then turn around and use the same constitutional guaranty to defeat its obligation to pay for the facility so acquired and being used for public school purposes.
> "If this can be done, sanctity of contract becomes nothing more than a windy platitude. It extracts the moral element from the law, the property that saves it from becoming effete and putrid. Bereft of its moral philosophy, the fundamental and statutory law of a democracy becomes as bread without salt, as a woman without charm, or a man without honor. The spirit of it

has departed and nothing remains but dry bones too inert to rattle."

However, a majority of the Court could not agree to the opinion, so a decision without an opinion (See Appendix F, page 36) was entered. Specific reference to the *Hampton* case, supra, was made in the opinion, thus clinching forever the proposition that the decision has no authority under the rule of *stare decisis;* is not binding on any State court, either appellate or lower. This divided opinion was in effect at the time the Circuit Court of Appeals decided the instant case. Obviously that court was no more bound by the decision than any other court in the State of Florida.

An examination of these leading cases as compared with this one case, decided by an evenly divided court, should leave no doubt in this Court's mind but that the Circuit Court of Appeals was not bound by the decision and was clearly correct in following the great weight of authority and holding the bonds valid.

III.

The Statute not shown unconstitutional beyond all reasonable doubt.

If the Supreme Court of the United States is to grant a writ of certiorari and thus make a determination of whether or not a statute enacted by the Legislature of the State of Florida is repugnant to the Florida Constitution, it must be shown beyond all reasonable doubt that the act is repugnant to the State Constitution. That is to say, it must be shown that the Circuit Court of Appeals has decided a question of local law in a way probably in conflict with the applicable local

decisions of the State of Florida. Do the decisions of the State of Florida show such an act to be unconstitutional beyond all reasonable doubt? Obviously not.

It has been heretofore aptly shown that:

(1) The Circuit Court of Appeals was not bound by either the opinion of the Supreme Court of Florida or the lower court in the case of *State ex rel. Vickery vs. Mowat, supra.*

(2) The decision of the Supreme Court of the State of Florida, evenly divided, is contrary to the clear weight of authority in the State of Florida.

The sole question now remains is whether or not Chapter 10,655, Laws of the State of Florida, Acts of 1925, authorizing the issuance of the Hernando County Board of Public Instruction bonds, on an independent determination thereof by the Circuit Court of Appeals, assuming that that Court was not bound by either the appellate or lower court decision in the evenly divided opinion of *State ex rel. Vickery vs. Mowat, supra,* is so repugnant to the Constitution of the State of Florida that the Supreme Court of the United States must step in, reverse the Circuit Court of Appeals, and strike the statute down as contrary to the Constitution of the State of Florida. The Supreme Court of the State of Florida refused to strike it down by an evenly divided opinion.

The law is well settled in Florida that no duly enacted statute should be judicially declared inoperative on the ground that it violates organic law, unless it clearly appears beyond all reasonable doubt under any rational view that may be taken of the statute, it is in positive conflict with some identified or designated provision of constitutional law.

Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, L. R. A. 1916 D, 913, Ann. Cas. 1915 D, 99; *Lainhart v. Catts*, 73 Fla. 735, 75 So. 47; *Stewart v. DeLand-Lake Helen Special Road, etc., Dist.*, 71 Fla. 158, 71 So. 42; *Edwards v. State*, 62 Fla. 40, 56 So. 401; *State v. Clearwater (Fla.)*, 139 So. 377; *Board of Com'rs v. Forbes Pioneer Boat Line*, 80 Fla. 252, 86 So. 199, reversed on other grounds in 258 U. S. 338, 42 S. Ct. 325, 66 L. Ed. 647.

Using this frequently stated and well established premise as a basis for an examination of the law of the State of Florida, and as enunciated by the State Courts, it appears:

(1) The Circuit Court of the State of Florida determined that the act authorizing the Hernando County Board of Public Instruction bonds was constitutional when it entered a judgment declaring the bonds valid.

(2) A Circuit Court in Bay County determined that bonds issued under a precisely similar statute were also constitutional when that Court validated similar bonds.

(3) The Supreme Court of the State of Florida, in the case of *Warren vs. Board of Public Instruction*, supra, which decision was, in effect, unreversed by any later decision at the time of the issuance of the bonds herein sued upon, held that the case was not repugnant to the Constitution of the State of Florida.

(4) The same Circuit Court which validated the bonds issued under a precisely similar statute by the Board of Public Instruction of Bay County, Florida, later declared them void and contrary to the Constitution of the State of Florida.

(5) On a writ of error to this judgment, the Supreme Court of the State of Florida, by an evenly divided opinion, was unable to declare that that act (precisely similar to the act at hand) was repugnant to the Constitution of the State of Florida.

(6) The Federal District Court subsequently held the Bay County, Florida, Board of Public Instruction bonds valid obligations of the District.

These decisions then were not so binding upon the Circuit Court of Appeals that it, in an independent determination by it of the constitutionality of the act authorizing the bonds so as to compel that Court, as the mouthpiece from which must emanate the Florida law, as determined by the Florida decisions, to declare the authorizing act void beyond any and all rational view taken of it. The Supreme Court of Florida could not make such a determination; the lower court in Bay County, in determining a similar act, determined the question both ways; the Supreme Court of the State of Florida in other cases on similar statutes have consistently held the obligations valid and binding.

That the Circuit Court of Appeals proceeded correctly can hardly be questioned!

IV.

The Rendition of the Judgment.

It should be observed that on July 26, 1940, without leave of court first obtained, after the decision of the Circuit Court of Appeals, holding the securities valid obligations against the Petitioner, 112 F. (2) 914, upon the mandate

coming down to the lower court, the Defendant filed "Additional defenses to the Complaint" (R. 9803, 11). The main defense relied on was that the Defendant denied the execution or delivery of the interest coupons sued upon and denied that the interest coupons were clipped from the bonds executed by the Defendant.

No demand for a jury trial was requested.

On August 14, 1940, (R. 9803, 13) request for admission under Rule 36 of the Federal Rules of Civil Procedure was served upon the Defendant requesting admission that the interest coupons exhibited to the Defendant were genuine; that each of the coupons was executed and delivered by the Defendant. To this request, the Defendant, purporting to comply with rule 36, filed a sworn answer, which is sworn to by the same individual, as Chairman of the Board, whose facsimile signature appears on the coupons. He swore that it was impossible for him to tell whether the coupons were genuine or not; that he could not admit whether the coupons were executed and delivered with the bonds because the coupons had been detached from the bonds.

Thereupon, affidavits were filed by the Plaintiffs showing that they were holders of the bonds; by another person showing that the coupons were actually phyically detached from the original bonds; and by a third person who had manually computed the interest on the coupons.

Thereupon, the Judge entered final judgment on the coupons. Petitioners apparently make no claim that the coupons were not valid, or that they were not actually issued by the taxing unit, or that the amount of the judgment was not cor-

rect, but their sole claim is that they had no chance to cross examine the witnesses who filed the affidavits.

The spirit of the Federal Rules of Civil Procedure was certainly borne out in this case. The Judge definitely ascertained that there was no material fact actually and in good faith contraverted by the Defendant; no real defenses had been interposed. It is not amiss to observe at this time that the very person who denied the execution of the bonds and who denied that the coupons were detached from the bonds is the same person whose facsimile signature appears on the coupons. The Defendant apparently makes no complaint about the correctness of the judgment; about the amount of the judgment; or about its liability on the instruments, the sole cry being that no opportunity was given them to cross examine the persons who filed the affidavits; no counter affidavits were filed; nor did the Defendant request a jury trial. When the Court determined that no material fact had actually and in good faith been contraverted, there was nothing for it to do but to enter summary judgment for the full amount of its claim. A similar interpretation of Rule 56 of the Civil Rules of Procedure was upheld in the following cases:

American Insurance Co. vs. Gentile Brothers Company, (CCA 5, 1940), 109 F. (2) 732, Cert. Den. 310 U. S. 633, 60 Sup. Ct. 1075, 84 L. Ed. 1403, Cf. *Port of Palm Beach District vs. Goethals*, (C. C. A. 5) 104 F. (2) 706. That Court, speaking through Judge McCord, said:

> "When the motion for summary judgment was heard, there was no genuine issue as to any material fact, and the Court properly entered judgment for the plaintiff."

There had been no demand for a jury trial, but assuming that there should have been a trial on the fictitious issues presented, it is clear that from the record existing at the time of the motion for summary judgment, the Court was clearly convinced that if the action were permitted to go to trial, the Court would have to render verdict and judgment for the Plaintiff. In such case, motion for summary judgment should be granted. *Mutual Life Insurance Co. of New York vs. Ballard*, 1 F. R. D. 180; *Whiteman vs. Federal Life Insurance Co.*, 1 F. R. D. 95.

CONCLUSION

In conclusion, it is respectfully submitted that the writ of certiorari should be denied in this cause because:

(1) The case of *State ex rel, Vickery vs. Mowat*, decided by an evenly divided Court, was not binding upon the Circuit Court of Appeals.

(2) The decision of the Circuit Court of Appeals holding the act authorizing the issuance of the bonds constitutional is clear in accordance with the great weight of authority in the State of Florida.

(3) The authorizing statute has not been shown to be so repugnant to the Constitution of the State of Florida that the Supreme Court of the United States should make an independent determination thereof.

(4) That the procedure following and entering the final judgment on affidavits was a correct procedure under the Federal Rules of Civil Procedure.

Respectfully submitted,

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